



Who is a “Parent” – Paternity Disestablishment and Other Emerging Issues

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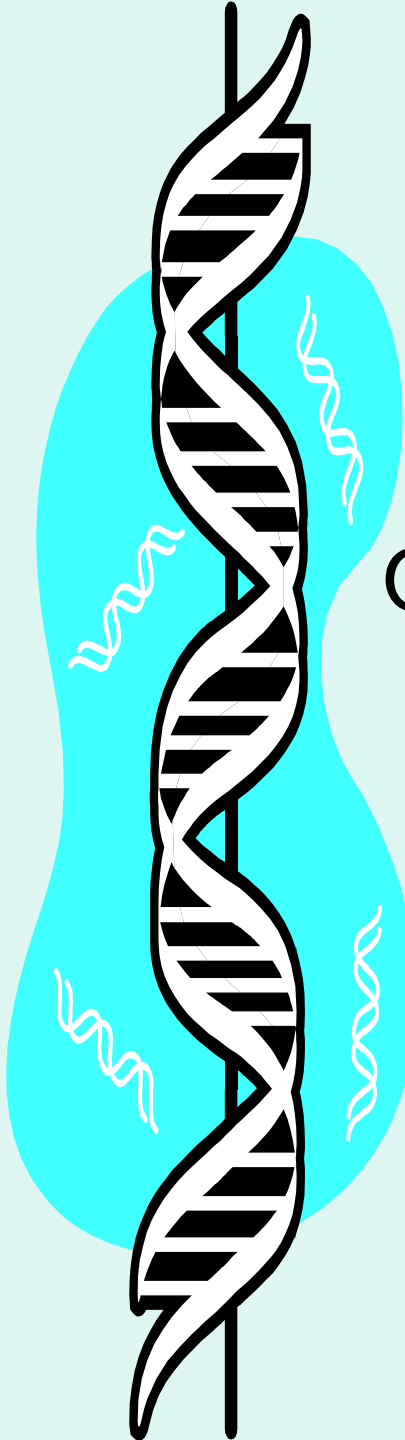
Supporting Children and the Judiciary

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When is a Dad,
Who is not a Dad,
a Dad?

Policy Question



Once paternity is legally established, should a man be allowed or forced to abandon his social, emotional and financial responsibilities to his child?

How is Paternity Legally Established?

- Marriage
- Voluntary Establishment
- Ruling of the Court
 - Evidence Based
 - Default

What is the Government's Interest?

- Constitutional Interest:
Equal treatment of children
- Fiscal Interest:
Government as payor of last resort
- Legal Interest:
Rule of law



Welfare and Child Support

- **Child Support Is Major Impetus to Streamlining the Paternity Establishment Process**
 - Voluntary paternity establishment
 - Use of emerging technology
 - Mandatory default process
- **Hugely Successful Effort**
 - Increase in Paternity Establishment overall
550,000(1993) to 1.8m(2008)
 - Increase in Paternity Establishment in IVD
45%(1993) to 94.9%(2008)
 - Increase in Award Establishments
55%(1993) to 79.1%(2008)

Downside of Success

- Voluntary paternity establishment
Good faith acknowledgement
misfires
- Use of emerging technology
DNA testing--a two-edge sword
- Mandatory default process
The courts can be wrong

Paternity Disestablishment



Policy Dilemma 1

**Some Dads,
who are not Dads,
end up being legal Dads that
are required to support
children who are not their
biological children.**



Policy Dilemma 2

**Some children
who had a Dad,
end up having no Dad
and lose the
emotional, social and
financial support
from a Dad**



Why Difficult Policy Call?

- No easy answers
- Interests of different actors often conflict
- No one “typical case”
- Emotional language used in the debate – paternity “fraud”
- Intense media attention



Policy Considerations

- **child wellbeing: emotional, social and financial**
- **fairness and justice to the fathers**
- **fairness and justice to the mother**
- **social and legal implications of paternity disestablishment.**

What are the Facts?

- Disputed Paternities

About 25% to 30% not the Dad

- General Population

About 2% to 10% not Dad but varies by population

Current Practices

- Nine states have PD statutes
(AL, AZ, GA, IL, IN, GA, MD, OH, VA)
- Free genetic testing (uptake less than 1% in TX demo)
- Reopen default orders
(small uptake (1400) cases in CA; MO “redo” now underway)
- Disparate approach to marital and non-marital children – when must the “best interest of the child” be considered?

Competing Legal Presumption Issues

- Voluntary acknowledgement signed by one father while child born of marriage between mother and a different man
- Positive genetic testing completed on someone who is not the “legal” father, either by marriage or via signed acknowledgement
- May courts discount acknowledgements? Do genetics trump legal documents? Should IV-D agencies pay for genetic testing to resolve competing presumption conflicts?
- 42 U.S.C. sec. 666(a)(5); 45 C.F.R. 302.70

Future Possibilities

- Mandatory Testing
- Constitutional Review
- Uniform Parentage Act (2002)



Further Reading:

www.ncsl.org

www.clasp.org

Bellis, et al

@www.jech.bmjournals.com

www.aspe.hhs.gov





Establishing Paternity in Same Sex Partner Cases

Why is it Important?

- More than 250,000 children are being raised by same-sex couples in the United States
- More and more, courts are struggling to apply traditional equitable parentage principles in same sex partner cases.



Unique Challenges in Same-sex Partner Cases

- Biological Connection
 - May be natural birth mother
 - May have donated genetic material (with intent to raise child jointly)
- Gender-neutral reading of the UPA
 - UPA (1973) Section 21 – insofar as practicable, the provisions of the UPA applicable to the father-child relationship are also applicable to the mother-child relationship
 - UPA (2002) Section 201(a) clarifies that the mother-child relationship may be established by:
 - Giving birth
 - An adjudication of the woman's maternity
 - Adoption
 - Valid gestational agreement

Unique Challenges in Same-sex Partner Cases

- Presumed parent/equitable adoption/*de facto* parent
- Pre-birth agreements/co-parenting plans
- Domestic partnership laws
- DOMA



Unique Challenges in Same-sex Partner Cases

- What if 2 “moms” sign a VAP?
- Is a support order entered in same-sex partner case entitled to FFC?
- May a new support order be entered?
- What is the impact of UIFSA?

Unique Challenges in Same-sex Partner Cases

- What about support orders from FRCs or where foreign order is requested to be enforced under state-level agreement or on the basis of comity?



Unique Challenges in Same-sex Partner Cases

CASE EXAMPLES:

- ***Matter of Sebastian***, 879 N.Y.S.2d 677 (Surr. Ct. N.Y. Co. 2009) (Court grants a second parent adoption to the genetic mother of a child conceived by donating her ova to be fertilized by an anonymous sperm donor and carried by her partner. Given NY's "evolving jurisprudence of same-sex relationships, equal protection full faith and credit, and the effects of DOMA, the only remedy available in NY that would accord both parents full and unassailable protection was a second parent adoption.)
- ***Halpern v City of Toronto***, 172 O.A.C. 276 (Ontario) [2000] (The right to same-sex marriage is recognized under the Canadian Charter of Rights and Freedoms.)
- ***Carol Chambers v Karen Chambers***, 2005 Del. Fam. Ct. LEXIS 1 (Del. Fam. Ct. 1/12/05) (An ex-partner of a lesbian couple found to be a de facto parent within the meaning of Delaware child support law, had legally established visitation rights, and was equitably estopped from refusing to pay child support.)

Unique Challenges in Same-sex Partner Cases

CASE EXAMPLES:

- **Matter of H.M v. E.T**, 65 A.D.3d 119, 881 N.Y. S.2d 113 (N.Y. App. Div., 2nd Dept. 2009); reversed on appeal by 2010 N.Y. LEXIS 621 (N.Y. May 4, 2010) *Decision on remand*, **Matter of H.M. v. E.T.** 906 N.Y.S.2d 85, (N.Y. App. Div. 2d Dep't 2010) (Canadian birth mother filed an application with the Ontario, Canada agency seeking to have a New York woman adjudicated the parent of mother's 12-year old child; she also seeks child support. Mother alleges that in 1989 the women lived together in New York in a monogamous relationship and agreed together for mother to become pregnant through artificial insemination. Mother alleges they followed this plan and mother became pregnant with sperm from an anonymous donor. After the child's birth respondent acted as a parent for a time but respondent ended the relationship in 1995, about 4 months after the child was born. Mother and child moved to Canada; her requests for voluntary contribution to the child's support were refused. Canada then transmitted a UIFSA petition to NY, seeking paternity and support. **On remand (decided 8/2/10), the issue before the court was whether mother's petition sufficiently states a cause of action for child support under New York's Family Court Act** The opinion examines at length the doctrines of equitable estoppel and implied contract. "[T]his court has previously employed the 'implied promise-equitable estoppel approach' to preclude a man with no biological or adoptive connection to a child from disavowing a relied-upon, implied promise to support the child, thus preventing the man from leaving the child without the support of two parents, as originally contemplated." (citations omitted). This same reasoning is applicable to the same-sex partner of the biological mother. Where she "consciously chooses, together with the biological mother, to bring that child into the world through [sperm donation], and where the child is conceived in reliance upon the partner's implied promise to support the child, a cause of action for child support... has been sufficiently alleged." Case is remanded to the Family Court on the issue of whether the partner should be equitably estopped from denying her responsibility for child support. The Family Court orders determining that the partner was estopped were reinstated.)

Further Reading

Paula Roberts, *Parentage Case Update: Can a Child Have Two Mothers*, Pub. No. 05-53 at www.clasp.org/publications/parentage_update_120105

Susan F Paikin and William Reynolds, *Parentage and Child Support: Interstate Litigation and Same-Sex Parents*, 26 **Delaware Lawyer** 26 (Spring 2006)

Can Gay Marriage Strengthen the American Family?
Brookings Institution Briefing 4/1/04,
www.brookings.org/comm/events/20040401.htm



Paternity Issues in Assisted Reproduction Technology (ART) Cases



Unique Challenges in ART Cases

- Medical advances and scientific advances offer multitude of ART technologies , where child may be biologically related to one, both, or neither member of the couple and may have as many as 6 “parents”
 - Sperm donor
 - Egg donor
 - Gestational mother
 - Gestational mother’s husband
 - Intended mother
 - Intended father



Unique Challenges in ART Cases

- Competing legal theories: societal need to strengthen the traditional 2-parent family and recognition that in today's science and social structure picking 2 is artificial.
- Fundamental legal presumptions and genetic identity – does biology still control?
- Giving birth vs. giving genetic material
- Intent-based model for ART parenting presumptions

Unique Challenges in ART Cases

- Some general rules:
 - Man who anonymously donates sperm to a sperm bank is NOT a parent of a child conceived by ART (though lots of discussion about breaking the seal of confidentiality)
 - But less clear if it is self-help – informal/known donation
 - Husband is obligated to support child born via artificial insemination (even though parties do not execute agreement legitimizing child under state law)
 - Also wife can't contest husband's paternity
 - UPA (2002) – biology does not control (Sec. 702: "A donor is not a parent of a child conceived by means of assisted reproduction.")
 - Does not apply to children conceived through sexual intercourse

Unique Challenges in ART Cases

- Canada: Assisted Human Reproduction Act is federal legislation that applies across Canada, regulates a variety of issues relating to new technologies and reproduction.
 - Goal is to avoid commoditization of human life by sanctioning practices such as commercial surrogacy and commercial egg donation.
 - Critics: the issue of who are the legal parents and who is liable for child support is not covered by the legislation (determination of parentage is a provincial matter)



Unique Challenges in ART Cases

Policy Questions

- How many individuals may serve a recognized parenting role for a given child? In multiple parent situations, how should the different aspects of the parenting roles be distributed?
- Which should be more determinative of parental responsibilities and parental status – the bio-genetic connection or the intention to become a parent?
- How should the IV-D agency approach ART cases?

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Questions??

